BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
EDWIN V. BARMACH)

OPINION ON PETITION FOR REHEARING

On July 29, 1981, we modified the action of respondent Franchise Tax Board in denying the petition of appellant Edwin V. Barmach for reassessment of a jeopardy assessment of personal income tax in the amount of $70,481 for the year 1978. Pursuant to Revenue and Taxation Code section 18596, both appellant and respondent have filed timely petitions for rehearing.

The facts surrounding respondent's issuance of the subject jeopardy assessment are set forth in our prior opinion (Appeal of Edwin V. Barmach, Cal. St. Bd. of Equal., July 29, 1981), and the rendition thereof is herein incorporated by reference. In our prior opinion, we found that respondent had established at least a prima facie case that appellant had received unreported income from illegal bookmaking activities during the appeal period, but we concluded that it had improperly reconstructed the amount of that income. By determining that appellant's income was equal to the total dollar amount of the wagers he had accepted during the appeal period, respondent incorrectly included in appellant's income bets successfully placed by his clientele: those

amounts did not constitute gross income to appellant. (Cf. Rev. & Tax. Code, § 17071.) We also determined, in accordance with section 17297 of the Revenue and Taxation Code, that appellant was not entitled to deduct from his gross income any losses he incurred resulting from wagers successfully placed with him. (See also Hetzel v. Franchise Tax Board, 16 Cal.App.2d 224 [326 P.2d 611] (1958).)

The final issue dealt with in our prior opinion concerned appellant's contention that the subject jeopardy assessment could not be sustained because it had been determined by reference to evidence that had been illegally obtained by law enforcement authorities. While we observed that it had been judicially determined that the improperly procured evidence could not be used in appellant's criminal trial on charges of bookmaking, we nevertheless concluded that there existed no. authority prohibiting respondent from considering such evidence for purposes of determining appellant's personal income tax liability.

While appellant specifically notes that he does not challenge that portion of our prior opinion dealing with the manner in which his income is to be properly reconstructed, his brief in support of his petition for rehearing: (i) charges that "the purpose of taxing Mr. Barmach is clearly to punish him and deter him from ever again participating in alleged bookmaking activities;" (ii) repeatedly asserts that respondent's action in this matter constitutes part of a policy which "is factually and legally congruent with the enforcement of the penal laws:" (iii) impliedly accuses this board of condoning "street-justice" by permitting respondent to consider improperly procured evidence; (iv) asserts that our prior opinion would result in the deprivation of his property without due process of law; and (v) finally concludes by stating that the "legal alchemy" of our prior opinion is "reminiscent of Charles Dickens' famous quotation: 'If the law says that, then the law is an ass."'

Stripped of hyperbole, we gather that appellant's contentions are as follows: (i) that respondent is unable to establish even a prima facie case that he received unreported income from alleged bookmaking activities during the appeal period because all of the evidence relied upon by respondent was illegally acquired and "seized in violation of Article I, [section] 13 of the California Constitution;" (ii) that

respondent's issuance of a notice to withhold deprived him of his property without due process of law in that respondent relied upon improperly procured evidence; and (iii) that our prior decision improperly concluded that respondent could consider evidence obtained in violation of the Fourth Amendment, 1/ as well as article I, section 13 of the California Constitution, for purposes of determining his tax liability.

Respondent has not objected to any portion of our prior opinion; it merely requests that we specifically find that appellant earned $351,791 from illegal bookmaking activities during the appeal period. Respondent states that it has arrived at this dollar amount in accordance with the views expressed in our prior opinion.

As we need discuss respondent's request only if appellant's contentions are found to be without merit, we shall initially discuss those contentions in the order set forth above.

The issue of whether respondent may use evidence improperly acquired by law enforcement authorities to establish a prima facie case that a criminal suspect has received unreported income from illegal activities was directly confronted in Horack v. Franchise Tax Board, 18 Cal.App.3d 363 [95 Cal.Rptr. 717] (1971). In that case, the court observed that a previous judicial determination had held that certain evidence had been procured by police officials as a result of an illegal search and seizure; that ruling rendered the evidence inadmissible in a criminal prosecution. The court specifically held, however, that "[b]ased on a review of the [same evidence] ... , [respondent] was justified

1/ The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

in concluding that petitioners had not declared any income derived from the sale of [narcotics] or paid any taxes 'thereon." (Horack v. Franchise Tax Board, supra, 18 Cal.App.3d 363, 367.) In accordance with the cited decision, we conclude that appellant's contention that respondent may not consider improperly procured evidence to establish a prima facie case that appellant received unreported income from illegal bookmaking activities is unmeritorious.

Appellant's second argument, while somewhat unclearly framed, appears to be that respondent's notice to withhold, issued in accordance with Revenue and Taxation Code section 18817, deprived him of his property without due process of law in that respondent relied upon improperly procured evidence. Appellant argues that "the summary seizure of virtually all of an accused citizen's assets without an opportunity to be heard first, followed by an instantaneous and imaginative tax lien .. . [constitutes] swift and sure punishment unencumbered by constitutional delays such as motions to suppress illegally seized evidence and trial by jury." 2/ After careful consideration of appellant's argument, we find that it is in contradiction to established authori'ty.

It is settled law that respondent's summary administrative procedures for the collection of jeopardy income tax assessments are not violative of due process rights. (Mason v. Superior Court, 121 Cal.App.3d 876 [175 Cal.Rptr. 4621 (1981); Kanarek v. Davidson, 85 Cal. App.3d 341 [148 Cal.Rptr. 86] (1978); Horack v. Franchise Tax Board, supra.) This includes that part of those procedures whereby respondent is empowered to issue and serve a notice to withhold (see Kanarek v. Davidson, supra), even if respondent has relied upon evidence illegally obtained by law enforcement authorities. (Horack v. Franchise Tax Board, supra.)

2/ It should not go unobserved that the spectre envisioned by appellant did not take place here. Before respondent could take any action to withhold the substantial amount of cash seized at the time of his arrest, appellant made an assignment of that fund to his attorney. Respondent succeeded in collecting only $1,353.76 from appellant's bank account.

Appellant's final contention is that the subject jeopardy assessment may not be sustained, even as modified by our previous opinion, because, in his view, the exclusionary rule prohibits respondent's consideration of illegally obtained evidence for the purpose of determining tax liability just as it excludes such evidence from a criminal trial. As we noted in our prior opinion, the Municipal Court for the Los Angeles Judicial District held that the evidence obtained by law enforcement authorities for use in appellant's criminal trial on bookmaking charges had been procured as the result of an illegal search and seizure: that finding resulted in the dismissal of the criminal charges against appellant. The same evidence, which appellant states was obtained in violation of article I, section 13, of the California Constitution, constitutes the sole basis for respondent's issuance of the subject jeopardy assessment.

In resolving the question concerning respondent's use of this evidence, we look initially to the test articulated by the California Supreme Court in People v. Moore, 69 Cal.2d 674 [446 P.2d 800] (1968); there the court examined the applicability of the Fourth Amendment exclusionary rule to a narcotics commitment proceeding. The court held that "[w]hether any particular rule of criminal practice should be applied in a narcotic addict commitment proceeding depends upon consideration of the relationship of the policy underlying the rule to the proceeding." (People v. Moore, supra, 69 Cal.2d 674, 681.) In determining the applicability of the Fourth Amendment exclusionary rule to respondent, we must examine both the policy underlying the rule and the purpose and nature of respondent's action. (See In re Martinez, 1 Cal.3d 641 [463 P.2d 734] (1970):)

The policy underlying the exclusionary rule has two aspects. The first and primary one in California is to deter government officials from lawless conduct by denying them a reward for such conduct. (People v. Cahan, 44 Cal.2d 434 [282 P.2d 905] (1955).) The secondary aspect is based upon the principle that the state should not profit by its own wrong in using in criminal proceedings evidence obtained by unconstitutional methods, thereby keeping the judicial process free of the use therein of such evidence. (Emslie v. State Bar, 11 Cal. 3d 210 [520 P.2d 991] (1974); Governing Board. Metcalf, 36 Cal.App.3d 546 [111 Cal.Rptr. 724] (1974).) The second aspect of the policy underlying the exclusionary rule obtains in both civil and criminal cases. (See Note,

Constitutional Exclusion of Evidence in Civil Litigation, 55 Va.L.Rev. 1484, 1488 (1969).) There is considerable reason to doubt, however; "whether the first and primary reason for the rule exists to any appreciable degree in civil cases." (Governing Board v. Metcalf, supra, 36 Cal.App.3d 546, 549.)

While it may not be inconceivable that prohibiting respondent from using illegally obtained evidence would supplement the deterrent force of the criminal trial exclusionary rules, we must balance that problematic gain against the harm done to respondent in the exercise of its responsibilities and the social consequences that such an application of the Fourth Amendment exclusionary rule would entail in this context. (In re Robert P., 61 Cal.App.3d 310 [132 Cal.Rptr. 51 (1976); In re Dunham, 16 Cal.3d 63 [127 Cal.Rptr. 343] (1976); Emslie v. State Bar, supra; In re Martinez, supra; Governing Board v. Metcalf, supra.) As the California Supreme Court stated in In re Martinez: "Our desire to preserve legal symmetry cannot obscure the necessity of examining the practical merits of the underlying competing societal interests at stake." (Martinez, supra, at p. 649.)

We believe that the incremental deterrent effect that would be achieved by prohibiting respondent from considering illegally procured evidence is virtually nonexistent. Police officials are unlikely to be halted by the thought that their unlawful conduct will prevent the imposition of taxation upon one's earnings from illegal activities because respondent will be unable to consider the evidence that they improperly obtain. (See In re Martinez, supra, 1 Cal.3d 641, 649-650.) In conducting their investigations of suspected criminal activity, the police are "generally completely unaware of any consequences of success in their investigative efforts other than the subsequent criminal prosecution of the suspected offender." (Governing Board v. Metcalf, supra, 36 Cal.App.3d 546, 549.)

As previously noted, appellant has argued that respondent's action in this context constitutes part of a policy which "is factually and legally congruent with the enforcement of the penal laws." Appellant further states that "[i]t is common knowledge, and perhaps a proper subject for judicial notice, that law enforcement officers routinely use the taxing authority as a means of accomplishing the aims and objectives of criminal law

enforcement." Despite the vehemence with which appellant sets forth this matter of "common knowledge," he has failed to present any evidence to support the assertion that the actions of California tax authorities have "a close identity to the aims and objectives of criminal law enforcement." (People v. Moore, supra, 69 Cal.2d 674, 682.) In any event, a question would arise in this regard only if it could be demonstrated that law enforcement authorities were acting to enforce the penal law "at the behest of [respondent]." (Horack v. Franchise Tax Board, supra, 18 Cal.App.3d 363, 369.) We therefore concludethat respondent's actions have no relationship to the aims and objectives of criminal law enforcement, and that to apply the exclusionary rule to respondent would not deter improper police conduct. (See Cramer v. Shay, 94 Cal.App.3d 242 [156 Cal.Rptr. 303] (1979).) Finally, it should be noted that appellant's assertion that the action of California tax authorities in matters of this sort "is congruent with the enforcement of the penal laws" runs counter to authoritative documentation and actual experience. 3/

The harm done to respondent in the exercise of its responsibilities and the social consequences which would result from imposing the exclusionary rule upon respondent would be significant. Where, as nere, the improperly obtained evidence constitutes the sole basis for respondent's issuance of a jeopardy assessment, respondent would find itself utterly unable to act if the improperly procured evidence were to be excluded. While we are cognizant that such evidence is inadmissible in a criminal proceeding, we believe that an agency whose duty it is to impose'the personal income tax "upon

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3/ In 1979, the latest year for which accurate statistics are available, respondent issued approximately 470 jeopardy assessments arising out of cases in which taxpayers were believed to have earned unreported income from criminal activities; 435 of those jeopardy assessments reflected income derived from the sale of narcotics. In the same year, there were 98,082 narcotics seizures in this state (California Department of Justice, Controlled Substances Seized in California 1979, at p. 11 (1980)), and an undetermined number of arrests and convictions for bookmaking and other criminal activities producing taxable income.

the entire taxable income of every resident of this state" (Rev. & Tax. Code, § 17041), is in a different posture than the courts which must decide one's original guilt. To blind respondent to the pertinent facts would mean permitting appellant, and those similarly situated, to earn substantial amounts of tax-free income from engaging in criminal conduct.

A decision to expand the exclusionary rule in the manner suggested by appellant would effectively work the perverse result of placing law-abiding taxpayers in the position of subsidizing criminal activities: it would also indirectly increase the tax burden of those engaged in legitimate endeavors. Moreover, such a holding could even be viewed as encouraging those with criminal proclivities to engage in illegal conduct. Secure in the knowledge that a fortuitous improper act on the part of law enforcement authorities would result in the possible dismissal of the criminal charges against him, one engaged in criminal activities would also enjoy the additional comfort of having his nefarious1y derived earnings completely shielded from taxation. 4/ Mindful that respondent's actions have no relationship to the aims and objectives of criminal law enforcement, and in accordance with California case law permitting the use of illegally obtained evidence in a civil context when a balancing of the social consequences wrought by prohibiting the use of such evidence outweighs any theoretical or actual gain in deterrence, we conclude that respondent may properly consider such evidence. (Emslie v. State Bar, supra; In re Martinez, supra; In re Dunham, supra; Cramer v. Shay, supra; In re Christopher B., 82 Cal.App.3d 608 [147 Cal. Rptr. 390] (1978); In re Robert P., supra; People v. Rafter, 41 Cal.App.3d 557 [116 Cal.Rptr. 281] (1974); Governing Board v. Metcalf, supra; see also Horack v. Franchise Tax Board, supra.) The fact that article I,

4/ Appellant has unconsciously supported this latter point. As previously noted, he asserts that "the purpose of taxing Mr. Barmach is clearly to ... deter him from ever again participating in alleged bookmaking activities." This can be read to mean that if his earnings from "alleged bookmaking activities" were subject to taxation, then he would be discouraged from engaging in such conduct.

section 13, of the California Constitution 5/ requires a more exacting standard with respect to searches and seizures than the minimum standards required to satisfy the Fourth Amendment's proscription of unreasonable searches (People v. Brisendine, 13 Cal.3d 528 [531 P.2d 1099] (1975)), has no bearing with regard to the issue of whether evidence obtained in violation of the former may be considered by respondent in this context. (See, e.g., In re Robert P., supra; In re Christopher B., supra.)

In reaching this conclusion, we specifically note that the police conduct in this matter was not so egregious as to offend the collective conscience of the community. (See In re Martinez, supra, 1 Cal.3d 641, 650; see also Griswold v. Connecticut, 381 U.S. 479, 483 [14 L.Ed.2d 510] (1965).) Here, the trial court in appellant's criminal proceeding suppressed the relevant evidence because law enforcement authorities had searched appellant's trash in violation of his constitutional right to privacy; the fruits of that search were also suppressed. 6/ Such illegality, we believe, is

5/ Article I, section 13 (formerly art. I, § 19), provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

6/ The record of this appeal indicates that the judge who issued the police officers a warrant to search Mr. Barmach's residence on the basis of evidence obtained by the officers' search of appellant's trash, was the same judge who later quashed both the evidence obtained through the search of the trash and the later search of appellant's residence. His action in issuing the officers a search warrant for appellant's residence when he had prior knowledge that the officers had searched appellant's trash without a warrant, strongly implies that he was unaware that the initial search was illegal. We cannot find that the officers' conduct was egregious when the judge had impliedly condoned it.

insufficient "to brutalize the temper of a society." (Cf. Rochin v. California, 342 U.S. 165, 172-174 [96 L.Ed. 183](1952), wherein the conduct of law enforcement authorities in obtaining evidence by forcibly pumping a suspect's stomach was found to "[shock] the conscience.") In accordance with the court's holding in Martinez, however, we explicitly note that were we to be presented with an instance in which respondent considered evidence obtained under such egregious circumstances, "we might well conclude that the constitutional demands of due process could not countenance any governmental use of such evidence." (In re Martinez, supra, 1 Cal.3d 641, 651; see also Emslie v. State Bar, supra.)

The cases cited by appellant in favor of extending the criminal trial exclusionary rules to this context either are in fact contrary to that position or involve cases resulting in criminal or quasi-criminal liability. Such authority is irrelevant to the issue presented here. Furthermore, we do not regard the forfeiture of property cases cited by appellant (see, e.g., One Plymouth Sedan v. Pennsylvania, 380 U.S. 693 [14 L.Ed.2d 170] (1965); People v. One 1960 Cadillac Coupe, 62 Cal.2d 92 [396 P.2d 706] (1964)) as persuasive authority in favor of the position he has advanced. The California courts have noted that forfeiture proceedings, "although labeled civil, [are] ... criminal in nature." (Governing Board v. Metcalf, supra, 36 Cal. App.3d 546, 549, fn. 2; see also People v. Moore, supra.)

In accordance with the views expressed above, we conclude that appellant's petition for a rehearing must be denied.

Having concluded our discussion of appellant's various contentions, we are now free to turn our attention to respondent's request that we specifically find that appellant earned $351,791 from illegal bookmaking activities during the appeal period. As previously noted, respondent states that it has arrived at this figure in accordance with the views expressed in our prior opinion. Upon review of appellant's records, and the results of respondent's recomputation of appellant's income, we conclude that respondent has computed appellant's income from bookmaking activities during the appeal period in accordance with the views expressed in our prior opinion.

Appeal of Edwin V. Barmach

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18596 of the Revenue and Taxation Code, that the petition for rehearing of the appeal of Edwin V. Barmach from the action of the Franchise Tax Board in denying his petition for reassessment of a jeopardy assessment of personal income tax in the amount of $70,481 for the year 1978, be and the same is hereby denied, and that our order of July 29, 1981, be and the same is hereby affirmed.

Done at Sacramento, California, this 16th day of November, 1981, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Reilly, Mr. Bennett and Mr. Nevins present.

Ernest J. Dronenburg, Jr., Chairman

George R. Reilly, Member

William M. Bennett, Member

Richard Nevins, Member

_____, Member